

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CAROL LUCARELLI, special administratrix of)
the estate of FRANCES FLOWERS, deceased;)
JERRY FLOWERS, JR.; AMANDA)
FLOWERS; SHANE FLOWERS; and WAYNE)
FLOWERS, surviving heirs of FRANCES)
FLOWERS, deceased,)

Plaintiffs,)

vs.)

DVA RENAL HEALTHCARE, INC.; DOES 1)
through 50, inclusive; ROE CORPORATIONS)
1 through 50, inclusive,)

Defendants.)

Case No.: 2:07-cv-1205-RLH-RJJ

ORDER

(Motion to Dismiss–#15; Motion to
Remand–#18; Motion to Strike–#27;
Motion to Transfer–#36; Motion for Leave
to File Supplement–#43)

Before the Court is Defendant DVA Renal Healthcare, Inc.’s (“DVA”) **Motion to Dismiss** (#15), filed September 13, 2007. The Court has also considered Plaintiffs Carol Lucarelli, special administratrix of the estate of Frances Flowers, and the above-named surviving heirs’ Opposition (#17), filed October 1, 2007, and Defendant’s Reply (#21), filed October 12, 2007.

Also before the Court is Plaintiffs’ **Motion to Remand** (#18), filed October 8, 2007. The Court has also considered Defendant’s Opposition (#25), filed October 23, 2007, and Plaintiffs’ Reply (#28), filed November 6, 2007.

Also before the Court is Defendant’s **Motion to Strike Errata** (#27), filed November 5, 2007. The Court has also considered Plaintiffs’ Opposition (#35), filed November 19, 2007, and Defendant’s Reply (#37), filed November 30, 2007.

1 Also before the Court is Defendant's **Motion to Transfer** (#36), filed November
 2 20, 2007. The Court has also considered Plaintiffs' Opposition (#38), filed December 10, 2007,
 3 and Plaintiffs' Reply (#41), filed December 17, 2007.

4 Also before the Court is Plaintiffs' **Motion for Leave to File Supplement to**
 5 **Motion to Remand** (#43), filed January 8, 2008.

6 BACKGROUND

7 This case is one of at least thirty-two lawsuits filed by separate plaintiffs in Nevada
 8 state court based on allegations of Defendant's negligent operation of hemodialysis treatment
 9 facilities. Defendant removed at least fifteen of these lawsuits to the United States District Court
 10 for the District of Nevada on the basis of diversity of citizenship. Of the thirty-two lawsuits, only
 11 two plaintiffs actually received treatment in Nevada. In the instant case, Plaintiffs are Ohio
 12 citizens and the decedent, Ms. Flowers, received her dialysis treatments in Ohio. Defendant is a
 13 Tennessee corporation with its principal place of business in California.

14 Plaintiffs filed this case in Nevada state court on November 15, 2006. The
 15 Complaint named Gambro Healthcare Renal Care, Inc. ("Gambro"), Defendant's sibling
 16 corporation, as the sole defendant. By stipulation, the state court consolidated this case with the
 17 other hemodialysis treatment cases for the purposes of discovery and to hear Defendant's
 18 consolidated motion to dismiss. The Parties agreed to address first the issue of whether Plaintiffs
 19 had sued the proper defendant. In March 2007, the Parties stipulated to a voluntary dismissal of
 20 Gambro in the suits in which it was incorrectly named, including this case. As part of the
 21 stipulation, Defendant agreed not to oppose Plaintiffs' request to amend and also to provide
 22 Plaintiffs' counsel with the correct corporate entity in all future hemodialysis-related cases.
 23 Plaintiffs filed their Amended Complaint in April 2007 and after receiving service,
 24 Defendant—on the basis of diversity—timely removed to this Court.

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DISCUSSION

I. Motion to Remand

Plaintiffs move the Court for an order remanding this case to the Eighth Judicial District Court for the State of Nevada. 28 U.S.C. § 1441 permits a defendant to remove a state court action if the federal district court has original jurisdiction. A defendant invoking the removal statute bears the burden of establishing jurisdiction, and the statute is strictly construed against removal. *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004). Consequently, “[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). But while a federal court “will not take jurisdiction if it should not . . . it is equally true, that it must take jurisdiction if it should.” *Cohens v. Virginia*, 19 U.S. (1 Wheat) 264, 404 (1821). Thus, a district court with proper jurisdiction lacks discretion to remand. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 356 (1988).

Defendant removed this case from Nevada state court based on diversity of citizenship. *See* 28 U.S.C. § 1332(a). Plaintiffs do not dispute this Court’s jurisdiction or the procedural validity of removal; rather, they argue that Defendant waived the right to remove this case because of its state court actions in other lawsuits.

“A party, generally the defendant, may waive the right to remove to federal court where, after it is apparent that the case is removable, the defendant takes actions in state court that manifest his or her intent to have the matter adjudicated there, and to abandon his or her right to a federal forum.” *Resolution Trust Co. v. Bayside Developers*, 43 F.3d 1230, 1240 (9th Cir. 1994). “A waiver of the right to removal must be clear and unequivocal.” *Id.* (citations and internal quotations omitted). “In general, the right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits.” *Id.* (citations and internal quotations omitted).

The Court begins by noting that waiver is an exception to its duty “to adjudicate a controversy properly before it.” *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188

1 (1959). Waiver in this case must be based on Defendant's affirmative conduct in the state court in
2 this case. The record establishes that Plaintiffs filed this case in state court in November 2006 and
3 served Gambro in December 2006. In state court, the Parties stipulated to consolidate this action
4 with the other Gambro cases for the purposes of discovery and to hear Defendant's motion to
5 dismiss. Moreover, the Parties stipulated to resolve first whether the Complaint named the proper
6 defendant. In March 2007, the Parties stipulated to dismiss the suit against Gambro and amend
7 the Complaint to name DVA as the proper defendant. Once served, Defendant timely removed
8 this case to federal court on the basis of diversity because Defendant is a Tennessee corporation
9 and Plaintiffs are citizens of Ohio. Plaintiffs submit no evidence that Defendant took other actions
10 in the state court to adjudicate the merits of this suit. Instead, Plaintiffs contend that Defendant's
11 state court conduct in the other consolidated cases constitutes waiver. Moreover, Plaintiffs argue
12 that considerations of efficiency and judicial economy justify remand because this case would be
13 part of the consolidated action if it were to remain in state court.

14 The Court finds the state court consolidation unpersuasive in its determination of
15 whether Defendant properly removed this case to federal court, and Defendant's conduct in the
16 other cases cannot waive its right to remove in this case. The Court recognizes that allowing this
17 case to proceed as part of the state court consolidation might promote efficiency and a
18 conservation of judicial resources,¹ but those considerations are secondary to the Court's duty to
19 exercise its jurisdiction and Defendant's right to proceed in a federal forum. Moreover, efficiency
20 considerations alone cannot justify remand. *See Thermatron Prods., Inc. v. Hermansdorfer*, 423
21 U.S. 336, 351 (1976) ("That justice may move more slowly in some federal courts than in their
22 state counterparts is not one of the considerations that Congress has permitted the district courts to

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24 ¹ The Court notes, however, that while the consolidated cases involve similar tort
25 claims against related defendants, proceeding in a common forum would not necessarily be
26 more efficient. The evidence and witnesses are located in several different states, and at
minimum, each plaintiff will need to uniquely prove causation and his or her damages.
Causation and damages are significant issues given that each plaintiff was already seriously
ill before receiving dialysis treatments in Defendant's clinics.

1 recognize in passing on remand issues.”), *abrogated on other grounds by Quackenbush v. Allstate*
 2 *Ins. Co.*, 517 U.S. 706, 714–15 (1996).

3 Accordingly, Plaintiffs’ Motion to Remand is denied.

4 **II. Motion to Transfer**

5 Defendant moves the Court to transfer this case to the Southern District of Ohio
 6 pursuant to 28 U.S.C. § 1404(a). Section 1404(a) permits a district court to transfer any civil
 7 action to any other district or division where the action might have been brought for the
 8 convenience of the parties and witnesses and in the interests of justice. “To support a motion for
 9 transfer, the moving party must show: (1) that venue is proper in the transferor district; (2) that the
 10 transferee district is one where the action might have been brought; and (3) that the transfer will
 11 serve the convenience of the parties and witnesses and will promote the interest of justice.”
 12 *Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp.*, 820 F. Supp. 503, 506 (C.D. Cal.
 13 1992).

14 **A. Venue in the District of Nevada**

15 Defendant removed this action to this Court pursuant to 28 U.S.C. § 1441(a), which
 16 provides: “any civil action brought in a State court of which the district courts of the United States
 17 have original jurisdiction, may be removed . . . to the district court of the United States for the
 18 district and division embracing the place where such action is pending.” Here, Plaintiffs filed this
 19 case in Clark County; this Court embraces Clark County and is therefore the proper venue for
 20 removal. *See Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665 (1953).

21 **B. Propriety of Action in the Southern District of Ohio**

22 “In determining whether an action might have been brought in a district, the court
 23 looks to whether the action initially could have been commenced in that district.” *Hatch v.*
 24 *Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). Plaintiffs could have commenced this action
 25 in the Southern District of Ohio if that court would have had subject matter jurisdiction over the
 26 claims and personal jurisdiction over the Parties.

1 Pursuant to 28 U.S.C. § 1332, Plaintiffs could have brought this action in the
2 Southern District of Ohio under diversity jurisdiction because the Parties are diverse and the
3 amount in controversy exceeds \$75,000. Ms. Flowers was an Ohio citizen at the time of her
4 death, and thus Carol Lucarelli, special administratrix of Ms. Flower's estate, is deemed a citizen
5 of Ohio. *See* 28 U.S.C. § 1332(c). Moreover, Defendant asserts that the surviving heirs of Ms.
6 Flower's estate are also Ohio citizens, and Plaintiff does not contest that assertion. Defendant is
7 incorporated in Tennessee and maintains its principal place of business in California.
8 Accordingly, the Parties are diverse as required by § 1332. Also, Defendants have shown that
9 Plaintiffs seek damages for loss of support, companionship, society, consortium, and pain and
10 suffering caused by Ms. Flower's death, as well as special damages for medical care, treatment,
11 burial and funeral expenses, and punitive damages, which exceed the \$75,000 threshold.
12 Therefore, the Southern District of Ohio would have original jurisdiction over this action.

13 In addition, the Southern District of Ohio would have general personal jurisdiction
14 over the Defendant because its contacts are substantial, systematic, and ongoing. "When
15 determining whether there is personal jurisdiction over a defendant, a federal court must apply the
16 law of the state in which it sits, subject to constitutional limitations." *Reynolds v. Int'l Amateur*
17 *Athletic Fed'n*, 23 F.3d 1110, 1115 (6th Cir. 1994). "The Ohio long-arm statute allows an Ohio
18 court to exercise personal jurisdiction over nonresidents of Ohio on claims arising from, *inter alia*,
19 the nonresident's transacting any business in Ohio." *CompuServe, Inc. v. Patterson*, 89 F.3d
20 1257, 1262 (6th Cir. 1996) (citing Ohio Rev. Code Ann. § 2307.382(A)). "It is settled Ohio law,
21 moreover, that the 'transacting business' clause of the statute was meant to extend to the federal
22 constitutional limits of due process." *Id.* Defendant operates a hemodialysis facility in Columbus,
23 Ohio, where it transacts business, employs Ohio citizens, and is subject to Ohio taxation.
24 Moreover, the Defendant treated Ms. Flowers at their Columbus, Ohio facility and would
25 therefore expect to be hailed into court in Ohio for any injury caused by the treatments. Thus,
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1 subjecting Defendant to jurisdiction in the Southern District of Ohio would comport with Ohio's
2 jurisdictional statute and not violate constitutional due process.

3 Consequently, Plaintiff could have brought this action originally in the Southern
4 District of Ohio because the Ohio federal court would have original jurisdiction over the claims
5 and personal jurisdiction over the Parties.

6 **C. Convenience of the Parties and the Interests of Justice**

7 In considering the convenience of the parties and witnesses and the interests of
8 justice, courts evaluate: (1) the location where the alleged harm occurred, (2) the state that is most
9 familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties'
10 contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen
11 forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of
12 compulsory process to compel attendance of unwilling non-party witnesses, (8) the ease of access
13 to the evidence, and (9) the relevant public policy of the forum state. *Jones v. GNC Franchising,*
14 *Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000).

15 Here, the convenience of the Parties and witnesses and the interests of justice favor
16 transferring this case to the Southern District of Ohio. Ms. Flowers received treatments in
17 Columbus, Ohio at Defendant's hemodialysis facility. The evidence and witnesses of her
18 treatments, including the doctors and nurses who treated her, are all located in Ohio. As such,
19 compulsory process would be unavailable to secure their attendance in Nevada. Moreover, the
20 costs of litigation would be substantially greater because the attorneys and witnesses would be
21 forced to travel for discovery and trial. Ohio also has the most significant relationship to this case,
22 and consequently, Ohio tort law applies. *See Gen. Motors Corp. v. Eighth Judicial Dist. Court*,
23 134 P.3d 111, 116 (Nev. 2006). Thus, a federal court in Ohio would be more familiar with the law
24 of this case. In addition, while Plaintiffs chose to file this suit in Nevada, the "operative facts" of
25 the case did not occur in Nevada, and so Plaintiffs' preference "is entitled to only minimal
26 consideration." *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). Finally, the Court is unaware

1 of any Nevada public policy that favors retaining a Nevada venue when the only connection with
2 the state is Plaintiffs' counsel.

3 In sum, the Court finds that removal venue is proper in the District of Nevada, that
4 this action could have originally been brought in the Southern District of Ohio, and that the
5 convenience of the Parties and witnesses and the interests of justice favor transferring this case.
6 Accordingly, the Court grants Defendant's Motion to Transfer.

7 **III. Motion to Strike, Motion to Dismiss, & Motion for Leave to File Supplement**

8 Because the Court grants Defendant's Motion to Transfer, all remaining motions
9 are denied as moot.

10 **CONCLUSION**

11 Accordingly, and for good cause appearing,
12 IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#15) is DENIED
13 as moot.

14 IT IS FURTHER ORDERED that Plaintiffs' Motion to Remand (#18) is DENIED.

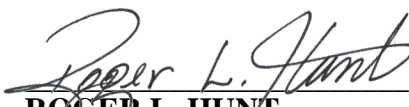
15 IT IS FURTHER ORDERED that Defendant's Motion to Strike (#27) is DENIED
16 as moot.

17 IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File Supplement
18 (#43) is DENIED as moot.

19 IT IS FURTHER ORDERED that Defendant's Motion to Transfer (#36) is
20 GRANTED.

21 The Court orders the case transferred to the Southern District of Ohio.

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23 Dated: January 10, 2008.

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26 **ROGER L. HUNT**
Chief United States District Judge